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**ORIGINAL**

August 4, 1997

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: Amendment of Section 73.202(b),  
FM Table of Allotments  
(Elkhorn City, Kentucky and  
Clinchco, Virginia) (PRM-97MM)

Dear Mr. Caton:

Transmitted herewith on behalf of East Kentucky Broadcasting Company is an original and four copies of a Reply to Opposition to Petition for Rule Making in the proceeding seeking the issuance of a notice of proposed rule making to amend the FM Table of Allotments to substitute Channel 221A for Channel 276A at Elkhorn City, and modify the license of WPKE-FM, Elkhorn City, Kentucky to specify operation on Channel 221A; and to substitute Channel 276A for Channel 221A at Clinchco, Virginia, and modify the license of WDIC-FM, Clinchco, Virginia to specify operation on Channel 276A.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,



John F. Garziglia

Enclosure

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**ORIGINAL**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

1997-1-107

In the Matter of )  
 )  
Amendment of Section 73.202(b) ) PRM-97MM  
Table of Allotments )  
FM Broadcast Stations )  
(Elkhorn City, Kentucky and )  
Clinchco, Virginia) )

To: Chief, Allocations Branch

**REPLY TO OPPOSITION TO PETITION FOR RULE MAKING**

East Kentucky Broadcasting Company, the licensee of WPKE-FM, Elkhorn City, Kentucky, by its attorneys, pursuant to Section 1.45(b) of the Commission's rules, hereby submits its reply to the July 16, 1997 Opposition to Petition for Rule Making filed by Dickenson County Broadcasting Corporation.<sup>1/</sup> In reply thereto, the following is submitted:

1. East Kentucky Broadcasting Company has filed a petition seeking the commencement of a rule making proceeding looking toward the substitution of Channel 221A for Channel 276A at Elkhorn City, Kentucky, and the modification of the license of WPKE-FM, Elkhorn City, Kentucky to specify operation on Channel 221A. This proposal requires the substitution of Channel 276A for Channel 221A at Clinchco, Virginia, and the modification of the license of WDIC-FM, Clinchco, Virginia to specify operation on Channel 276A. The entity filing the opposition, Dickenson

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<sup>1/</sup> By a Consent Motion for Extension of Time filed July 25, 1997, East Kentucky Broadcasting Company requested an extension of time to August 4, 1997 to submit its reply. Accordingly, this reply is timely filed.

County Broadcasting Corporation, is the licensee of WDIC-FM, Clinchco, Virginia.

2. Dickenson County Broadcasting Corporation does not submit any valid reasons why a Notice of Proposed Rule Making should not be issued as requested by East Kentucky Broadcasting Company. Dickenson County Broadcasting Corporation claims that the Commission should not move forward with a Notice of Proposed Rule Making: (1) because East Kentucky Broadcasting Company is required to address alternative methods of increasing power; and (2) because the East Kentucky Broadcasting Company petition is premature.

3. As to the first claim (the investigation of an alternative means of increasing power), the Commission has never required in any rule making proceeding that a rule change proponent show that alternate methods exist for possible increases in power in lieu of a rule making petition filed in conformance with Section 1.420 of the Commission's rules. In any event, the Commission will in its Notice of Proposed Rule Making request comments on the East Kentucky Broadcasting Company proposal. Dickenson County Broadcasting Corporation will then have the opportunity to argue that the public interest would not be served by the channel substitutions proposed by East Kentucky Broadcasting Company. In substance, the present opposition of Dickenson County Broadcasting Corporation is an attempt to

prematurely file comments in a proceeding in which a notice of proposed rule making has not been released.<sup>2/</sup>

4. Dickenson County Broadcasting Corporation also claims that the East Kentucky Broadcasting Company Petition for Rule Making is premature due to an application filed to modify the facilities of WSMG(FM), Tusculum, Tennessee (FCC File No. BMPH-970304IA). As pointed out by East Kentucky Broadcasting Company in its Petition for Rule Making, the WSMG(FM) application is fatally deficient and will be dismissed by the Commission. Dickenson County Broadcasting Corporation states, however, that WSMG(FM) "has the right to amend its application to cure any minor technical deficiency, citing Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments ("Conflicts") , 7 FCC Rcd 4917, Note 17 (1992)." If Note 17 is applicable to this situation at all, it provides that an amended WSMG(FM) application would be treated as if filed on the date of the amendment for purposes of applying the cutoff rule, which would simply put the WSMG(FM) application into the status of a counterproposal in this proceeding. See Conflicts, 7 FCC Rcd at

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<sup>2/</sup> Dickenson County Broadcasting Corporation engages in substantial speculation in its opposition without any support for such speculation. For instance, Dickenson County Broadcasting Corporation speculates that "WPKE-FM might be able to increase power to six kilowatts by obtaining consent to do so from the licensee of WELC-FM, Welch, West Virginia". In fact, such an option is not available to WPKE-FM, as WELC-FM cannot mutually consent to such a power increase as WELC-FM is in turn short spaced to WVSR-FM, Channel 274B, Charleston, West Virginia, and a mutual increase in those facilities is not possible, as there are fully spaced or less short spaced sites available to WELC-FM. See Section 73.213(c)(2) of the Commission's Rules.

4919 ("the amended application will be treated as if filed on the date of the amendment for purposes of applying the cutoff rule").

5. WSMG(FM) cannot, however, amend its application. First of all, such an amendment would not comply with Section 73.3522(a)(6) of the Commission's rules which specifically states "for a period of 30 days following the FCC's issuance of a public notice announcing the tender of the application, minor amendments may be filed as a matter of right". The one-step application of WSMG(FM) was accepted for tender by Public Notice Report No. 23952, released March 19, 1997. WSMG(FM) had until April 18, 1997 to amend its application. It has not done so and therefore such an amendment is subject to return as a violation of Section 73.3522(a)(6).

6. Further, even though Section 73.3522(a)(6) of the Commission's rules allows for a deficient application to be amended within 30 days after the receipt of an FCC deficiency letter, the rule specifically states that an applicant will not be permitted to amend its application and retain filing priority if the result of such an amendment is to alter the facility's coverage area so as to produce a conflict.<sup>3/</sup> More to the point, however, as shown in the April 16, 1997 objection of East Kentucky Broadcasting Company to the WSMG(FM) application, there

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<sup>3/</sup> In the event an amendment to the WSMG(FM) application did not produce a conflict with the East Kentucky Broadcasting Company rule making proposal, it would be acceptable, of course, with the effect that the East Kentucky Broadcasting Company rule making proposal could move forward without further reference to the WSMG(FM) application.


is no technically acceptable reference site which WSMG(FM) may specify in order to correct the deficiency in its application. Therefore, the WSMG(FM) application will be dismissed as deficient for a failure to specify a technically acceptable reference site for its proposed one-step upgrade.

7. In conclusion, the opposition of Dickenson County Broadcasting Corporation is premature, and is more appropriately considered as comments in the rule making proceeding once a Notice of Proposed Rule Making is issued. Further, the dismissal of the defective WSMG(FM) application will remove any conflict with the proposal of East Kentucky Broadcasting Company.

Respectfully submitted,

**EAST KENTUCKY BROADCASTING COMPANY**

By: \_\_\_\_\_

  
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its Attorney

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August 4, 1997

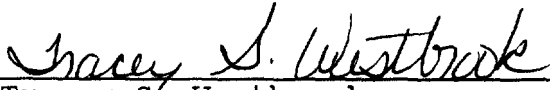
CERTIFICATE OF SERVICE

I, Tracey S. Westbrook, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that true copies of the foregoing "Petition for Rule Making" were sent this 4th day of August, 1997 by U.S. first class mail, postage prepaid, to the following:

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